BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRILL L. GRABER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,449
DILLON COMPANIES	)	
Self-Insured Respondent	)	

ORDER

Respondent requests review of the April 11, 2012 preliminary hearing Order entered by Special Administrative Law Judge C. Stanley Nelson.

ISSUES

The Special Administrative Law Judge (SALJ) found the following:

1. Claimant satisfied his burden of proof that his accident was the prevailing factor in causing multiple internal and external head/spinal injuries, and that he sustained personal injury by accident on August 21, 2011, as those terms are used in the new Act;

2. Claimant satisfied his burden of proof that he suffered an unexplained fall on respondent's stairs, a neutral risk which is compensable as the injury arose out of and in the course of his employment with respondent, and as claimant was exposed to a special risk or hazard to which the general public was not exposed;

3. Claimant is entitled to temporary total disability (TTD) from August 21, 2011, at a weekly rate of $344.43 until released by Dr. Lothes as being at maximum medical improvement (MMI) or returns to work;

4. Claimant is entitled to medical treatment under Dr. Lothes;

5. Medical bills incurred by claimant should be put in line for payment by respondent, with due consideration being given to the fact that health insurance had partially paid some of these bills.

The respondent requests review of whether claimant suffered an accidental injury arising out of and in the course of his employment based upon the new definition of injury. Respondent argues that the SALJ's Order should be reversed as claimant's accident was the result of an idiopathic fall and/or a neutral risk and is not compensable.

Claimant argues that the SALJ's Order should be affirmed as respondent required claimant to attend a mandatory safety meeting on a Sunday at an off site location, thus exposing claimant to a special risk and hazard of traversing stairs, which claimant was not familiar with.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant worked for Jackson's Dairy loading semi-trailers. His hourly wage was $17.20 per hour. Claimant's work hours were 3:00 p.m. to 11:30 p.m., Monday through Friday.

Claimant claims he was injured while attending a mandatory safety meeting. The safety meeting was scheduled from 9:00 a.m. to 2:30 p.m. The safety meetings for Jackson's Dairy were usually held at the Dairy during working hours, but this meeting was being held on Sunday, August 21, 2011, at Dillon's Offices a half a block east of the Dairy. This was considered an off day for claimant as he never worked on Sundays.

The meeting went from 9:00 a.m. to 2:30 p.m., with two breaks and a lunch break. Respondent provided the attendees with breakfast and lunch. Claimant testified that he is a diabetic and before he arrived at the meeting he took his diabetic medication and his transplant medication. Claimant has been a diabetic since his kidney transplant on July 11, 1998. Claimant also has high blood pressure and takes medication for it.

For breakfast, claimant had two glazed donuts and a soda. For lunch claimant had a sandwich, a bag of chips and a soda. Claimant used the stairs in question several times that day when he went out to smoke during the provided breaks. He had no problems until the end of the day.

As a diabetic, claimant tests his blood sugar once a day, every day, but on the date of the accident he had not tested it because he was running behind and didn't take the time to do it. He also testified that he notices no effects when his blood sugar is high and the only way he knows it is high is when he tests his blood.

Claimant testified that the meeting was held on the second floor of the building and the attendees had to walk up a flight of stairs to get to the location. The stairs were concrete with diamond plastic coating over them and with metal handrails. There was a

short skid pad at the front of the step. These particular type of stairs were made to accommodate high volumes of traffic.

Claimant testified that he used the two 15 minute breaks to go outside and smoke a cigarette. After the meeting claimant stopped by the restroom before leaving and that is the last thing he remembers. Claimant doesn't know if he passed out as he left the restroom. Claimant remembers using the restroom after the meeting, but doesn't remember leaving the restroom. The stairs are 20 to 30 feet from the restroom, but claimant doesn't remember getting there.

Claimant testified that when he came to he was being loaded aboard a Lifewatch helicopter. He later learned that he had fallen down the stairs. He does not know how or why he fell down the stairs. Claimant testified that he had only been in this particular building where the training was one time before. As a result of the accident, claimant shattered C1 and C3 through C4 in his cervical spine. He was in the hospital for two weeks. Claimant stopped smoking after the accident.

Since the accident claimant has been receiving treatment under Dr. Lothes and has not been working. At the time of this deposition, claimant had been a member of the Teamsters union for a year.

There is surveillance video of the area where the claimant fell, but claimant has not seen it. Claimant assumes that he hit his head on the handrail because he had a two inch laceration on the right side of his forehead and he shattered his top vertebra and broke the 3rd and 4th vertebra in his neck.

Claimant had surgery to repair his neck, was in a halo for 11 weeks and at the time of the preliminary hearing was in a hard neck brace. Claimant was told that he is going to need additional surgery. Claimant is receiving short-term disability in the amount of $350 a week, but by the time insurance is deducted he only gets $77 a week.

Timothy Heidebrecht, a plant process specialist for respondent, testified that walking up and down stairs is a part of every job with respondent on some level.

Mr. Heidebrecht testified that claimant was at the mandatory safety meeting on August 21, 2011, which was a Sunday. This is a normal day off for some of the employees, but everyone was paid for their attendance.

Mr. Heidebrecht testified that he did not notice claimant acting strange on the day of the meeting. He testified that these meetings are not usually held at the Dillon's meeting room. Mr. Heidebrecht learned about ten minutes after the meeting that claimant had fallen down the stairs.

Mr. Heidebrecht described the stairs as a commercial or industrial type of stairs, something significantly different than would be found in a residence. He testified that he wasn't sure if the stairs were concrete or steel underneath their rubberized, vinyl like coating.

From what Mr. Heidebrecht could gather, claimant's face or head hit the stairs and then he hit the landing. Mr. Heidebrecht did not witness the fall. He has never known claimant to have any issues with his diabetes. Mr. Heidebrecht does not directly work with the claimant, but does see him at least twice a week in passing on the job.

Mr. Heidebrecht is the union steward, so he had conversations about what happened that day with management at the plant and those that were on the scene. He had no duties in investigating the accident and would not unless respondent felt that discipline was warranted. In this instance, it was not.

Mr. Heidebrecht testified that there is video footage of the accident, which shows someone ending at the bottom of the stairs. It apparently does not show claimant arriving at the top of the stairs.

Scott Phillips, the first shift lead on the milk side of the business, is in charge of making sure everything runs smoothly. Mr. Phillips testified that he was on site when claimant fell, but he was not in the building at the time.

Mr. Phillips testified that the meeting was on a Sunday and was mandatory, therefore he along with the claimant and some others were in attendance on their day off. Employees were paid overtime for attendance at this meeting. Mr. Phillips testified that this meeting was supposed to be held during the week, but scheduling conflicts left no other choice but Sunday.

Mr. Phillips testified that the meeting was held at the Dillon's offices, but usually they are held at the Cosmosphere or Hutch Juco.

Mr. Phillips testified that claimant seemed to be acting normal that day and that he talked to claimant a couple of times while they were in line getting food.

Mr. Phillips testified that the risk of injury falling on the stairs in the building where the meeting was being held is higher than falling on stairs at home on carpet and pad because the stairs are pretty hard. However, he did not recall there being anything wrong with the stairs on the date of the accident. Mr. Phillips testified that no one knows how or why claimant fell.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(d) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(3)(A)(i-iv) states in part:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Claimant suffered a fall shortly after he exited the restroom after a safety meeting. There is no explanation for the fall and claimant remembers nothing after leaving the restroom. There were no witnesses to the fall and the video surveillance provided no help.

The logic of the SALJ was confusing. He stated that claimant's fall was not shown to be the result of a personal condition and was thus not idiopathic. Idiopathic is defined as being of unknown origin or cause, for which no etiology is known.[1]

Prior to the enactment of the new Act in Kansas, injuries which were clearly attributable to a personal condition of the employee and no other factor were not compensable. However, where an injury is attributable to a personal condition and some hazard of employment, compensation is usually allowed.[2] According to Larson's[3], the majority of jurisdictions compensate workers who are injured in unexplained falls based upon the analysis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. Kansas fell within this majority. However, the Kansas legislature, in its 2011 rewrite of the Act has displayed a clear intent to exclude such unexplained injuries from compensation. Not only are neutral risks no longer compensable, any unexplained accident is also excluded from compensation.

Here, claimant suffered a fall of unknown origin or cause. He remembers nothing from the time he entered the restroom until he awoke while being loaded on the helicopter. There were no witnesses to the fall, and video tape of the area provided no help. This Board Member finds that claimant's accident did not arise out of and in the course of his employment as defined under the new Act in Kansas. The accident and injury arose from idiopathic causes. The new Act specifically excluded such events from coverage. The award of benefits by the SALJ is reversed.

---

[1] Webster's II New College Dictionary 549 (1995).

[2] *Bennett v Wichita Fence Co.*, 16 Kan. App. 2d, 458, 824 P.2d 1001, (1992).

[3] 1 Larson's Workers' Compensation Law Sec. 7.04[1] (2004).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that he suffered personal injury by accident arising out of and in the course of his employment with respondent. The award of preliminary benefits in this matter is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson dated April 11, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
matt@bretzpilaw.com

Dallas L. Rakestraw, Attorney for Self-Insured Respondent
drakestraw@mtsqh.com

C. Stanley Nelson, Special Administrative Law Judge

[4] K.S.A. 44-534a.